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IN THE

Supreme Court of the United States

No. 417

OCTOBER TERM, 1969

ERNEST LEE GORDON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above entitled case on the 21st day of May, 1969, dismissing Petitioner's appeal as of right and overruling Petitioner's motion for leave to appeal.

CITATIONS TO OPINIONS BELOW

The opinion of the trial court overruling the motion for new trial is unreported and is printed in the Appendix *infra* p. 15. The four opinions of the Tenth District Court of Appeals are unreported and are printed in the Appendix *infra* p. 10, p. 11, p. 11, and p. 13. No opinion was rendered by the Supreme Court of Ohio. The dismissal of the appeal as of right is reported XLII Ohio Bar No. 21, p. 731 and printed in the Appendix *infra* p. 10. The overruling of the

motion for leave to appeal is reported XLII Ohio Bar No. 21, p. 732 and printed in the Appendix, *infra,* p. 10.

JURISDICTION

The dismissal of Petitioner's appeal as of right and the overruling of Petitioner's motion for leave to appeal were both entered by the Supreme Court of Ohio, the highest state court in which a decision could be had, on May 21, 1969. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Whether a prosecuting attorney may evade the rule announced by this court in *Griffin v. California,* 380 U.S. 609, that the Fifth Amendment forbids comment on a defendant's failure to take the stand by making comments whose purpose and effect is to emphasize to the jury that the defendant did not take the stand but which are phrased as comments on the defendant's "failure to offer evidence".

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C., Sec. 1257:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself . . ."

Amendment XIV:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Petitioner was tried and convicted by a jury in the Court of Common Pleas of Franklin County, Ohio, on a charge of obtaining two preparations of an exempt narcotic named Cosanyl within less than the 48 hour interval required by Ohio law. Basically the State attempted to prove only that the Petitioner had signed as a purchaser of Cosanyl in the exempt narcotics books of two different drugstores the same day. The pharmacists did not identify the Petitioner as the person who had purchased the Cosanyl and signed the books. The only evidence that the Petitioner was the person who had signed "E. Gordon" and the Petitioner's address was the testimony of a self-styled handwriting expert from the Columbus, Ohio Police Department [R. 61.] which was sharply attacked. [R. 62-68, 104.]

At the conclusion of his opening summation the prosecuting attorney commented during his last remark to the jury:

> "I would also like to call your attention that not one bit of this evidence has been contradicted in any way . . ." [R. 100.]

In his final summation the prosecuting attorney stated:

> ". . . not one person has taken the stand to say that anyone knew where this Defendant lived and *not one person has taken the stand to say that is not his signature on State's Exhibits 1 and 2.*" [R. 110.] (Emphasis added.)

A motion for a new trial was filed with the trial court. Point 1a of that motion was that the remarks of the prose-

cuting attorney were a violation of Petitioner's rights under the Fifth Amendment, the Fourteenth Amendment and *Griffin v. California.* [R. 124, 125.]

An appeal was taken to the Tenth District Court of Appeals of the State of Ohio. The comments of the prosecuting attorney were assigned as error in the Fourth Assignment of Error as violations of the Petitioner's rights under *Griffin v. California,* the Fifth Amendment and the Fourteenth Amendment. In its decision upholding the judgment below the Court of Appeals stated:

> "We find no error in the comments of the prosecutor in his closing argument (*United States vs. Johnson,* 337 F 2d 180, aff'd. in 383 U.S. 169; *United States vs. Wright,* 309 F 2d 735, cert. denied in 372 U.S. 929) and no reversible error committed under the other assignments.
>
> The judgment appealed from must be affirmed."

The federal constitutional issue was also presented to the Court of Appeals by two motions to reconsider and by a motion to certify the decision of the Court of Appeals in this case to the Ohio Supreme Court on the grounds that it was in conflict with the decision of another Ohio Court of Appeals in *State v. Murphy,* 13 Ohio App. 2d 159 on this same federal constitutional issue.

An entry affirming the judgment of the trial court was filed in the Court of Appeals on December 5, 1968.

An appeal was taken from the judgment of the Ohio Court of Appeals to the Supreme Court of Ohio. The notice of appeal was filed December 26, 1968. The appeal to the Supreme Court of Ohio was taken both by means of an appeal as of right and by means of a motion for leave to appeal. The only question presented to the Supreme Court of Ohio was the present federal constitutional question.

On May 21, 1969 the Supreme Court of Ohio overruled the motion for leave to appeal and dismissed the appeal as of right.

It is expected that the State will argue that this Petitioner waived his rights to raise the federal constitutional question by not objecting to the prosecuting attorney's comments while they were being made. There are three answers to this argument. 1. A rule requiring on the spot objections to comments by a prosecuting attorney on a defendant's failure to take the stand would be unjust and illogical if it existed. 2. Ohio does not have such a rule however. 3. The courts below did not require such an objection in the present case. Instead, the Tenth District Court of Appeals (which was the highest court to render an opinion in this case) clearly considered and decided the same constitutional issue we ask this court to consider. This is demonstrated by the language of the Court of Appeals stating "We find no error in the comments of the prosecutor in his closing argument . . ."

A rule requiring an objection to a comment on the defendant's failure to take the stand would be unjust. An objection by defense counsel or an instruction by the court on the prosecutor's misconduct would increase rather than decrease the danger of harm to the defendant.

Ohio has no rule requiring an objection to a comment on a defendant's failure to testify. Ohio requires objections when the trial court could have cured an error if it had been brought to the attention of the trial court. *State v. Glaros,* 170 Ohio St. 471. The Supreme Court of Ohio has held that the error which occurs when the prosecuting attorney comments upon the defendant's failure to testify is an error that the trial court cannot correct. *State v. Davis,* 10 Ohio St. 2d 136; *State v. Minamyer,* 12 Ohio St. 2d 67.

The Tenth District Court of Appeals therefore completely ignored the State's waiver argument and decided the federal constitutional question on its merits. This case therefore properly presents that federal constitutional question for the consideration of this court.

REASONS FOR GRANTING THE WRIT

1. The constitutional issue in this case presents for the consideration of this court a device which can and has been used to evade the rule announced by this court in Griffin v. California, 380 U.S. 609.

The constitutional issue was decided below on the theory that there is a distinction between comments on a defendant's failure to testify and comments on a defendant's failure to offer evidence. The Ohio Tenth District Court of Appeals cited *United States v. Johnson,* 337 F.2d 180, *aff'd* (on other questions) 383 U.S. 169; and *United States v. Wright,* 309 F.2d 735, *cert den'd* 372 U.S. 929 in holding that the prosecutor's comments in the present case were proper. Those cases hold that comments on a defendant's failure to offer evidence are proper despite a rule that comments on the defendant's failure to take the stand are forbidden.

Petitioner respectfully submits that there is no logical reason why a comment cannot be both a comment on the defendant's failure to offer evidence and a comment on the defendant's failure to take the stand. Consequently a rule that permits all comments on the defendant's failure to offer evidence encourages prosecuting attorneys to evade the *Griffin* rule by merely phrasing their comments on the defendant's failure to take the stand in the form of a comment on the defendant's failure to offer evidence.

The comments made by the prosecuting attorney in the present case illustrate how well a prosecuting attorney using this device can point out to the jury the defendant's failure to take the stand. Consider the obvious effect of the following comment on the defendant's failure to offer evidence:

> ". . . not one person has taken the stand to say that is not his signature on State's Exhibits 1 and 2." [R. 110.]

Consider also the impact of the following language which was upheld by a majority opinion in the Missouri Supreme Court in *State v. Baker,* 4 Crim. Law Reporter 2520, decided March 10, 1969. The prosecuting attorney had argued:

> "For whatever reason Mr. Baker may have had at the time, whatever fancy may have caught him, whatever his problem is, it is undisputed from this witness stand that he did it . . ." [4 Crim. Law Reporter 2520, at 2521.]

Justice Seiler of the Missouri Supreme Court dissented from the decision in *State v. Baker, supra,* and pointed out the effect of the decision on Missouri's own statute similar to the *Griffin* rule.

> "If we apply the statute so that it does not reach comment the clear effect of which is to point out that the defendant did not take the stand and dispute the charges, we . . . are, as a matter of its practical application in the trial of a criminal case, emasculating it." [4 Crim. Law Reporter 2520, at 2521.]

In jurisdictions where the distinction between comments on the defendant's failure to testify and comments on the defendant's failure to offer evidence is recognized there is nothing to prevent a careful prosecutor from making any comments he pleases on the defendant's failure to testify. In those jurisdictions the *Griffin* rule is merely a trap for the unwary prosecutor and will not control the conduct of the wary prosecutors.

Wary prosecutors can even study how to evade the *Griffin* rule in an A.L.R. annotation. 14 A.L.R. 3d 723 warns that there may be difficulties in some jurisdictions when the evidence could not have been contradicted by any person other than the defendant himself.

Except for that the prosecuting attorney is in:

> "a favorable tactical position. . . . [H]e need have little fear that his remarks will be regarded as constituting a hidden reference to the accused's failure to testify." [14 A.L.R. 3d 723, at 729.]

The annotation does suggest however that the prosecutor steer clear of repeating his statement too often, use the passive voice in his verbs, and avoid "making any specific identification of the defendant" as the one whose testimony is missing. [14 A.L.R. 3d 723, at 729.]

The attention of the court is also respectfully directed to the following statement in that annotation concerning the frequency and the importance of such comments by prosecutors:

> "Judging from the numerous cases reaching the reports in which statements of this kind have been made by the prosecution and attacked by the defense, most lawyers subscribe to the belief that such a comment is of great impact in inducing the average jury to bring in a verdict of guilty." [14 A.L.R. 3rd 723, at 729, footnote 1.]

Petitioner respectfully submits that this court should grant the writ in order to prevent deliberate evasion of the *Griffin* rule.

2. The decisions of the state courts and of the federal courts of appeals on the question presented by the constitutional issue in this case are in conflict and that conflict can only be resolved by this court.

The following courts have held that an argument by the prosecution that the defendant had failed to present evidence or that the prosecution's evidence was uncontradicted was a comment on the defendant's failure to take the stand: The United States Court of Appeals for the First Circuit in *Desmond v. United States,* 345 F. 2d 225; the Supreme Court of Alabama in *Street v. State,* 266 Ala. 289, 90 So. 2d 687; the Court of Criminal Appeals of Texas in *Watson v. State,* 171 Tex. Crim. 526, 352 S.W. 2d 120, and in *Traylor v. State,* 111 Tex. Crim. 58, 11 S.W. 2d 318 and the New York Supreme Court, Appellate Division, Second Department, in *People v. Norton,* 285 App. Div. 1165, 140 N.Y.S. 2d 382.

Similar comments have been upheld, however, by the

following courts: the United States Court of Appeals for the Fourth Circuit in *Davis v. United States,* 279 F. 2d 127 and *United States v. Johnson,* 337 F. 2d 180, *aff'd* (on other questions), 383 U.S. 169; the United States Court of Appeals for the Fifth Circuit in *Garcia v. United States,* 315 F. 2d 133; the United States Court of Appeals for the Seventh Circuit in *United States v. Wright,* 309 F. 2d 735 *cert. den'd* 372 U.S. 929; the United States Court of Appeals for the Ninth Circuit in *Leathers v. United States,* 250 F. 2d 159; and the Supreme Court of Missouri in *State v. Baker,* 4 Crim. Law Reporter 2520 (decided March 10, 1969) and in *State v. Perkins,* 382 S.W. 2d 701.

The State of Ohio itself is in conflict. Despite the holding of the Ohio Tenth District Court of Appeals in the present case, the only reported decision on the present question in Ohio, *State v. Murphy,* 13 Ohio App. 2d 159, forbids comment upon the defendant's failure to present evidence.

The conflict between these decisions cannot be resolved. It is a conflict between decisions which actually consider the natural effect and apparent purpose of the prosecutor's language and decisions that refuse to consider the natural effect of the prosecutor's language if any other interpretation of the prosecutor's language is possible.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM GERTNER
Counsel for Petitioner.

APPENDIX—OPINIONS AND JUDGMENT BELOW

ENTRY IN THE SUPREME COURT OF OHIO ON THE APPEAL FROM THE COURT OF APPEALS MAY 21, 1969

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the COMMON PLEAS COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN County for entry.

ENTRY IN THE SUPREME COURT OF OHIO ON THE MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS MAY 21, 1969

It is ordered by the Court that this motion is overruled.

ENTRY IN THE OHIO TENTH DISTRICT COURT OF APPEALS FILED DECEMBER 30, 1968

This cause came on for consideration on an Application to Certify this Court's judgment of December 5, 1968, to the Supreme Court of Ohio, as being in conflict with the judgment of the Court of Appeals of the Second Appellate District of Ohio, Clark County, Ohio, *State of Ohio vs. Murphy,* reported in Volume 13, Ohio App. 2d 159. This Court finds that its judgment is not in conflict.

It is, therefore, ORDERED, ADJUDGED, and DECREED that the Application to Certify is hereby denied.

DECISION OF THE OHIO TENTH DISTRICT COURT OF APPEALS RENDERED OCTOBER 29, 1968

Per Curiam.

We have reviewed all of the proceedings in this case, including the constitutional matter noted in appellant's memorandum of October 14, 1968, and conclude that the application to reconsider must be denied.

The judgment appealed from will be affirmed.

DECISION OF THE OHIO TENTH DISTRICT COURT OF APPEALS RENDERED OCTOBER 8, 1968

Per Curiam.

Appellant has filed an application requesting us to reconsider our decision of September 10, 1968.

In the memorandum in support of his application, appellant strenuously asserts that the majority was wrong when it stated that no claim had been made, either on the motion for a new trial or in this appeal, that the two forms of Cosanyl were in fact on the market at the time concerned. Appellant further, and with equal vigor, states that "both forms of Cosanyl were on the market at the time concerned."

Our view of this entire record still convinces us that there was ample evidence to support the jury's verdict. However, the question of appellant's having received a fair trial is not to be lightly regarded and it is upon this point that we deem it appropriate to instigate the procedure suggested by the dissenting opinion. Appellant should, and shall, have his opportunity to establish the existence of a genuine factual dispute concerning whether these two forms of Cosanyl were both on the market at the time appellant is accused of having made the illegal purchase.

Article IV, Section 3 (B) (f) of the Ohio Constitution as adopted May 7, 1968, provides:

"(B) (1) The courts of appeals shall have original jurisdiction in the following:

"(f) In any cause on review as may be necessary to its complete determination."

In our opinion this provision permits this court in an appeal on questions of law to go outside the record under limited circumstances and for limited purposes. It is apparent that basic constitutional rights, such as the right to trial by jury, cannot be evaded by the exercise of this new ancillary original jurisdiction. We also deem it inappropriate and undesirable to involve this court in the resolution of a disputed fact issue. However, the present case seems to offer a situation where the new jurisdiction can be utilized.

Appellant and appellee may submit any documents permissible under summary judgment procedures (Section 2311.041, Revised Code), and which are directed to the issue of whether the non-narcotic form of Cosanyl was available to appellant on the market on the date of the alleged crime. If no such documents are filed, or if the documents filed show that there is no genuine issue as to the fact that such a preparation was not so available, then this court will determine that the admission of hearsay evidence as to that fact was nonprejudicial and will affirm the judgment of conviction.

If such documents are filed and they establish the existence of a genuine issue as to such availability, then this court will determine that the admission of hearsay evidence in this case constituted prejudicial error, and will reverse the judgment and remand the cause for a new trial.

Appellant will have Ten (10) days from this decision to file documents. Appellee will have Five (5) days to file any opposing documents.

DUFFEY, P. J., TROOP, and HERBERT, JJ., concur.

DECISION OF THE OHIO TENTH DISTRICT COURT OF APPEALS RENDERED SEPTEMBER 10, 1968

Per Curiam.

This is an appeal from a conviction for the illegal purchase of exempt narcotics.

One of appellant's main contentions concerns the trial court's admission of certain hearsay evidence. In our opinion, a reading of this entire record fails to establish that the trial court's overruling of appellant's objection and motion to strike constituted reversible error.

It has long been established that while any error is important, only that which clearly works to the prejudice of the objector should be the basis for reversal. (*Smith vs. Flesher,* 12 Ohio St. 2d 107; *State vs. Stanton,* 15 Ohio St. 2d 215) In the case at bar, appellant's counsel reflected his own view of the non-prejudicial nature of the court's error when he stated in closing argument:

> " * * * The important thing that I am stressing here is not whether it was made or dispensed on January 4, 1964, and by the way, I will tell you this summation I drew up before I even heard Mr. Marsh this morning, that is not the important thing, whether it was in existence at that time. The important thing is that if they can be so wrong in a preparation which exists today, which are sold today in drugstores can't they be mistaken about a lot of other things that happened almost four years ago? That is the importance of my question about the type of drugs sold. * * * "

We accept counsel's description of the purpose for which the evidence of a non-narcotic Cosanyl was presented. Witnesses Miller and Joseph had been positive in their belief that no non-narcotic Cosanyl was on the market, and also testified that the Cosanyl which they sold to the appellant within the prohibited span of time contained a narcotic. Counsel's cross-examination of witness Marsh and appel-

lant's other evidence cast some doubt upon the credence which should be attributed to the druggists' testimony and, as counsel stated in his argument quoted above, this was the important objective sought. That objective was attained, but the jury obviously still felt that the State's evidence was worthy of belief. No claim was made on the motion for a new trial or in this appeal that the two forms of Cosanyl were in fact on the market at the time concerned.

We agree that if counsel for the State acted in the willful and deliberate manner described by counsel for the appellant, a breach of ethical responsibility may have occurred. However, unless misconduct of trial counsel results in reversible error, an otherwise error-free trial should be allow to stand and counsel's methods dealt with in another forum.

We find no error in the comments of the prosecutor in his closing argument (*United States vs. Johnson,* 337 F. 2d 180, aff'd. in 383 U.S. 169; *United States vs. Wright,* 309 F. 2d 735, cert. denied in 372 U.S. 929) and no reversible error committed under the other assignments.

The judgment appealed from must be affirmed.

TROOP, and HERBERT, JJ., concur.

DUFFEY, P. J., dissents.

DUFFEY, P. J., dissenting.

It appears that the preparation in question is produced in both narcotic and non-narcotic form. There is evidence that pharmacists as a practice may cause a purchaser to sign the purchaser register upon purchasing either form, although registration is only required by law if the preparation contains narcotics.

On rebuttal, the state's witness testified that the non-narcotic form was not produced or sold at the time in question, but rather many months later. His testimony was clearly hearsay and not admissible. It also went directly to a critical point in the defense, i. e., whether or not either or both purchases made may have been non-narcotic prep-

arations. Counsel objected to the testimony and moved to strike. He has pressed the point of the improper evidence in this court and demanded the right to require the state to properly prove the date at which this preparation became available.

In argument to the jury, counsel did argue that the "important thing" was the fact that the state's witnesses were mistaken. Making the best case possible in the face of an error does not constitute a waiver of the error. Counsel's statement is not sufficient to establish a waiver of the right of cross-examination and confrontation on the evidentiary issue of the existence of a non-narcotic preparation at the time of the sales to appellant.

Article IV, Section 3 (B) (f) of the Ohio Constitution, as adopted May 7, 1968, grants original jurisdiction "In any cause on review as may be necessary to its complete determination." On that authority, this court can inquire into whether there is any genuine fact issue as to the existence of the non-narcotic preparation at the time of sale. In the absence of such an inquiry, the state of the record on review compels me to find prejudicial error. I therefore dissent.

DECISION OF THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO RENDERED SEPTEMBER 19, 1967

On September 11, defendant moved for a New Trial, after a verdict of Guilty on one count, for Exempt Narcotics, on September 8, 1967.

The first ground assigned was irregularity in the proceedings on the part of the Prosecuting Attorney. We hold this complaint is not well taken.

We believe the verdict was sustained by sufficient evidence.

The motion is OVERRULED.